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No. 93-444

In the Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF PALO ALTO, ET. AL., PETITIONERS

v.

HAZEL R. O'LEARY, SECRETARY OF ENERGY, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly construed a 1980 memorandum of understanding that settled litigation concerning the allocation of hydroelectric power from the Central Valley Project in California.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Brobeck, Phleger & Harrison v. *Telex Corp.*, 602 F.2d 866 (9th Cir.), cert. denied, 444 U.S. 981 (1979)	5, 6, 9, 11
City of Santa Clara v. *Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1976), aff'd in part, rev'd in part *sub nom. City of Santa Clara* v. *Andrus*, 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 589 (1978)	2-3, 11

Statutes and rule:

Act of Aug. 12, 1955, Pub. L. No. 84-386, § 4, 69 Stat. 720	11-12
Act of Oct. 23, 1962, Pub. L. No. 87-874, § 201, 76 Stat. 1191-1192	12
Reclamation Project Act of 1939, 43 U.S.C. 485h(c)	2, 3, 11
Fed. R. Civ. P. 52(a)	9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 984 F.2d 1008. The opinion of the district court (Pet. App. 18a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1993. On June 23, 1993, the court of appeals denied a petition for rehearing. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on September 20, 1993. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATEMENT

1. This case addresses the proper interpretation of one term ("nonwithdrawable") in a settlement agreement resolving prior litigation in the district court. Pet. App. 4a. The settlement agreement addresses the allocation of hydroelectric power produced by the Central Valley Project (CVP) in California. Below, petitioners (Cities) interpreted the term "nonwithdrawable" to mean "not withdrawable for any reason," while the respondents contended that it was a term of art incorporating three exceptions. *Ibid.*

Prior to the litigation that resulted in the settlement agreement, the City of Santa Clara had obtained from the United States an allocation of CVP hydroelectric power on a "withdrawable" basis. The "withdrawable" condition allowed CVP to reduce or withdraw Santa Clara's allocation to meet the needs of other CVP municipal customers. These other CVP customers, which included Cities, received CVP power on a long-term, "nonwithdrawable" basis. Pet. App. 5a.

Beginning in the 1970s, CVP began withdrawing from Santa Clara's "withdrawable" allocation. Santa Clara brought suit in 1975 against the Bureau of Reclamation, United States Department of the Interior (whose marketing functions were later transferred to the Western Area Power Administration, United States Department of Energy (Western)), arguing that pursuant to 43 U.S.C. 485h(c), it was entitled to obtain the same type of long-term, "nonwithdrawable" allocation that other CVP customers enjoyed. Pet. App. 5a-6a; *City of Santa Clara* v. *Kleppe*, 418 F. Supp. 1243, 1250 (N.D. Cal. 1976), aff'd

in part, rev'd in part *sub nom. City of Santa Clara* v. *Andrus*, 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 859 (1978). After concluding that the Bureau had violated Santa Clara's procedural due process rights, the district court remanded to the Bureau for further administrative proceedings. See Pet. App. 19a. The court of appeals held that while "the Secretary had unreviewable discretion to determine how allocations among preference customers were made," "the Secretary could not continue its practice of selling CVP power to * * * a non-preference customer, if a preference customer was willing and able to purchase it." *Id.* at 5a-6a (citing *Andrus*, 572 F.2d at 672, and 43 U.S.C. 485h(c)). The court of appeals remanded so that the district court could determine whether Santa Clara had rights to the power sold to non-preference customers. Pet. App. 4a-6a.

2. In 1980, all then existing parties to the litigation, including Cities,[1] settled the litigation through a Memorandum of Understanding (MOU), effective through the year 2004, and a mutual release of claims. Pet. App. 6a, 20a. The MOU set guidelines for new contracts for the sale of CVP power. *Ibid.*

Under the terms of the MOU, Santa Clara, for the first time, received a contract right for an allocation of CVP power on a "nonwithdrawable" basis.[2] The district court reserved jurisdiction to

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[1] Cities had intervened following the remand. Pet. App. 20a.

[2] Santa Clara also received rights to an additional allocation on a "withdrawable" basis. Pet. App. 6a, 20a. Cities each received an increase in their pre-MOU "nonwithdrawable" allocations. *Ibid.*

enforce compliance with the MOU's terms and conditions. Pet. App. 6a, 20a.

3. In 1985, in accordance with the MOU, Western tendered new contracts to Santa Clara and Cities for the purchase of CVP power. The contracts permitted Western to make withdrawals from those customers' allocations for three stated contractual or statutory purposes: (1) to supply the pumping loads of the CVP's water supply functions; (2) to satisfy statutory entitlements of customers situated in three of the CVP reservoirs' counties of origin; and (3) to prevent the CVP system from exceeding the maximum peak load allowed under Western's power sales and transmission contract with the Pacific Gas and Electric Company (Contract 2948A). Pet. App. 6a-7a. Palo Alto, joined later by the other petitioners and Santa Clara, applied to the district court for an interpretation of "nonwithdrawable" in the MOU, and argued that the term exempted its allocation from withdrawals for the three stated purposes. *Id.* at 21a.[3]

The district court held that the term "nonwithdrawable" was not subject to any exception. Pet. App. 21a. The Ninth Circuit, without reviewing the merits, remanded to permit the district court to entertain other CVP customers' motions to intervene and to consider the intervening entities' evidence. *Id.* at 22a. The Ninth Circuit instructed the district court to consider extrinsic evidence to establish the

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[3] To date, Western has not had to make withdrawals for any of the three stated purposes. Pet. App. 7a. Under Cities' interpretation, however, if such a withdrawal became necessary, the CVP customers that were not parties to the MOU would bear the entire withdrawal burden. *Id.* at 8a.

meaning of "nonwithdrawable" under the California rule recognized in *Brobeck, Phleger & Harrison* v. *Telex Corp.*, 602 F.2d 866, 871-872 (9th Cir.), cert. denied, 444 U.S. 981 (1979). See Pet. App. 10a.

4. On remand, the parties agreed that the MOU preserved the kind of allocation that Cities had at the time of the settlement; they disagreed, however, on the terms of those pre-MOU allocations. The parties and the district court concentrated on Cities' pre-MOU power contracts—referred to as "the 1967 amendments." Pet. App. 23a, 25a.

Western, with the CVP customers that intervened,[4] contended that the 1967 amendments had provided for withdrawals for the three stated purposes. Cities contended that the 1967 amendments had eliminated the possibility of such withdrawals. Pet. App. 23a. The district court found that the language of the 1967 amendments was "reasonably subject to both interpretations," and that "extrinsic evidence regarding [the nature of] the 1967 amendments" with respect to withdrawals was inconclusive. *Id.* at 24a. Nevertheless, the district court held that "nonwithdrawable" clearly and unequivocally meant that

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[4] Three groups of CVP customers intervened: "First Preference Customers"—Trinity County Public Utilities District, Hayfork Valley Public Utility District, Calaveras Public Power Agency and Tuolumne County Public Power Agency; "Irrigation Districts"—Arvin-Edison Water Storage District, Banta-Carbona Irrigation District, Byron-Bethany Irrigation District, Glen-Colusa Irrigation District, James Irrigation District, San Luis Obispo Water District, West Side Irrigation District and West Stanislaus Irrigation District; and "Five Cities"—the California Cities of Lodi, Lompoc, Ukiah and Healdsburg, and the Bureau of Electricity of the City of Alameda.

the allocations were not subject to withdrawal for any reason. *Id.* at 29a.

5. The Ninth Circuit, applying *Brobeck, Phleger & Harrison* v. *Telex Corp.*, 602 F.2d 866, 871-872, cert. denied, 444 U.S. 981 (1979), reversed in a unanimous opinion. Pet. App. 1a-15a. The court agreed that the term "nonwithdrawable" in the MOU itself was ambiguous. *Id.* at 10a; see *ibid.* (the MOU's frequent use of "nonwithdrawable" suggests that the word "also may have a specialized meaning unique to the MOU"). Consequently, the court found it necessary to go outside the document's four corners to understand the MOU's undefined terms. *Ibid.*

The Ninth Circuit used, as a "starting point," the reported opinions that "set the stage for the MOU negotiations." Pet. App. 11a; see *ibid.* ("[i]n the MOU, 'nonwithdrawable' appears to serve the same function" as in *Kleppe* and *Andrus*).[5] Taking into account the parties' agreement that those cases used "nonwithdrawable" "to distinguish between the types of contracts Santa Clara and Cities had in the late-1960's," the court reasoned:

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[5] In the cited cases (see pp. 2-3, *supra*), both the court of appeals and the district court used "nonwithdrawable" to distinguish contracts under which the customer's power allocation was not subject to withdrawal to meet the requirements of other CVP customers to whom the power had previously been committed, from contracts like Santa Clara's under which the power was withdrawable to meet the requirements of other CVP customers. The parties to this appeal have stipulated that this is precisely the way "nonwithdrawable" is used in the reported opinions. Undisputed Fact 7, Joint Pretrial Statement, C.R. 463, at 14.

> the MOU appears to be an agreement by Western to sell power to Santa Clara on the same terms it had previously sold power to Cities. The determinative question, therefore, appears to be what Cities' pre-MOU contracts provided.

Ibid; see *id.* at 10a ("Since * * * the three stated purposes represent the limits of [Western's] legal ability to sell power, one reasonably would expect the MOU to accommodate this reality.").

Addressing Cities' pre-MOU contracts, the Ninth Circuit rejected the district court's conclusion that the language of the 1967 amendments was "reasonably subject to both interpretations." Pet. App. 13a. It held that the language in Article 7 of Cities' 1967 contract amendments[6] describing Cities' allocations (their Contract Rates of Delivery (CRD)) was "a straightforward recital of the three stated purposes," and "no relevant extrinsic evidence [existed] in the record that could alter the meaning of the 1967 amendments." *Ibid.*[7]

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[6] Article 7 is the amended version of Article 9 of the pre-existing contract. See Pet. App. 46a-47a.

[7] Cities had argued that the 1967 amendments, which referred to the "curtailment" of the level of "power available," did not permit withdrawals for the three stated purposes. Pet. App. 13a n.4. The court specifically rejected that argument (*ibid.*):

> Both "withdrawal" and "curtailment" have the same practical effect: the three stated purposes must be satisfied before sales to preference customers begin. In the event that the three stated purposes require so much power as to make it impossible to supply the full Contract Rate of Delivery, all customers will face prorata reductions.

Finally, the Ninth Circuit agreed with the district court that "the evidence about the conduct of the parties during the negotiations of the MOU" was inconclusive and that Western's interpretation would not "den[y] [Cities] all their anticipated benefits from the MOU." Pet. App. 13a-14a. The Ninth Circuit noted that "none of the extrinsic evidence relating to the MOU indicates an agreement by the parties to have post-MOU contracts differ from pre-MOU contracts with regard to the three stated purposes," and it concluded that "the MOU intended continuity with pre-MOU practice." *Id.* at 14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

This case is limited to unique circumstances that may never have actual consequences, even for the parties.[8] Although its procedural history is complex, the case is fundamentally simple. It presents a matter of the application of a well-established Cali-

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[8] It is entirely speculative whether the higher electricity rates that Cities foresee from the Ninth Circuit's interpretation of "nonwithdrawable" in the MOU will ever materialize. As the Ninth Circuit observed, "[t]o date, there have never been withdrawals for the three stated purposes. No one knows for certain if withdrawals ever will be necessary, or how extensive they might be." Pet. App. 7a.

The remote risk of any withdrawals puts in proper perspective Appendix K to the certorari petition. See Pet. App. 60a. That document, which projects the cost to Cities of replacement power if the maximum 25% of CVP power were withdrawn from 1994 through 2004, is not in any event part of the record.

fornia rule of contract interpretation (accepted by the parties as the governing rule of decision) to a document (the MOU) that embodies the settlement of a particular dispute in the district court. The court of appeals' resolution of that issue presents no issue of general importance warranting review by this Court.

1. Contrary to Cities' contention (Pet. 8-13), this case presents no issue regarding the necessity of appellate courts to abide by the "clearly erroneous" standard of review under Fed. R. Civ. P. 52(a). Nothing in the Ninth Circuit decision threatens the tenet that appellate courts are not to make factual determinations *de novo*. Because the district court found the extrinsic evidence "inconclusive," Pet. App. 23a, and rested its decision on a determination that the contractual language was "clear and unequivocal," *id.* at 29a, appellate review of that determination as presenting a question of law was appropriate. See *id.* at 9a (quoting *Brobeck*, 602 F.2d at 871) ("Under California law, the determination of whether a written contract is ambiguous is a question of law."). The court of appeals did not substitute its judgment for that of the district court with respect to any finding of fact. See Pet. App. 9a.[9]

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[9] The district court properly looked to other extrinsic evidence when it found that the 1967 amendments ambiguously used the term "nonwithdrawable." Pet. App. 25a; see *id.* at 9a (quoting *Brobeck*, 602 F.2d at 871) (determining whether a provision is ambiguous requires the trial court to receive preliminary "relevant extrinsic evidence that can prove a meaning to which the language of the contract is 'reasonably susceptible.' "). To the extent the court of appeals addressed those findings of fact, it affirmed the district court. Pet. App.

The court of appeals addressed three main issues. Each issue was either subject to *de novo* review or was not in dispute. First, it concluded that the MOU used the term "nonwithdrawable" ambiguously. Pet. App. 10a-11a. Second, the court of appeals relied upon the district court's conclusion that the parties agreed that the meaning of the term "nonwithdrawable" should be resolved by reference to the 1967 amendments. *Id.* at 25a ("both parties rely on their respective interpretations of the 1967 amendments in arguing their interpretations of the MOU"); see also Pet. 10 ("Cities contended their allocations of power

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13a-14a (finding inconclusive the extrinsic evidence of the conduct of the parties and Cities' contention that Western's interpretation would "den[y] them all their anticipated benefits from the MOU"). The court of appeals, however, properly reviewed de novo the application of those findings to the language of the 1967 amendments.

The district court made two findings of fact that the court of appeals did not mention in its opinion: (1) that Western's post-MOU publications "suggested that the MOU provided a determinate amount of power to each city and viewed the MOU as a significant break with past practices," and (2) that "[i]t seems odd that Western would not as a matter of course include[] explicit language providing for withdrawals in the MOU if this were the intended result." Pet. App. 27a. See also *id.* at 29a ("Western drafted the MOU * * *. If Western desired 'nonwithdrawable' to mean something other than its ordinary meaning it should have provided that definition in the MOU."). There is no indication that the court of appeals failed to weigh properly those factual conclusions. Moreover, to the extent that the district court relied on a finding that Western drafted the MOU, the court clearly erred. The undisputed facts in the record demonstrate that all the parties, including Cities, shared in the drafting of the MOU. Joint Pretrial Statement, Facts 11, 12, 13, C.R. 463, at 15.

became 'nonwithdrawable', as a result of the 1967 amendments to Cities' contracts which amendments fulfilled Western's commitment to Cities in 1964.").

Finally, the court of appeals held that the 1967 amendments unambiguously used the term "nonwithdrawable" to subject allocations for the three stated purposes. Pet. App. 13a. Because the court of appeals found the pre-MOU provisions to be unambiguous, it had no reason to look to other extrinsic evidence. *Brobeck*, 602 F.2d at 871 ("If the court finds after considering * * * preliminary [extrinsic] evidence that the language of the contract is not reasonably susceptible of interpretation and is unambiguous, extrinsic evidence *cannot* be received for the [broader] purpose of varying the terms of the contract." (emphasis added)). Following the analysis suggested by the parties, the court of appeals applied the pre-MOU meaning to the MOU. [10]

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[10] Although the court of appeals did not elaborate on the statutory limitations on Western's authority to sell the project's power, the court's reference to those limitations (see Pet. App. 10a (quoted at p. 7, *supra*)) provides an independent basis for its holding that the MOU incorporated the two stated purposes that have statutory underpinnings. First, the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), prohibits Western from entering into any power contract that would, in the opinion of the Secretary, "impair the efficiency of the project for irrigation purposes." See *City of Santa Clara* v. *Andrus*, 572 F.2d at 672.

Second, the need for Western to provide for withdrawals for "first preference" entities derives from statutory obligations to customers in the reservoirs' "counties of origin." A 1955 statute, which authorized the CVP's Trinity River Division, provided that customers in Trinity County would be entitled to receive up to 25% of the additional energy available from the

2. Cities nevertheless resort to extrinsic evidence relating to the 1967 amendments in an attempt to buttress their contention that the 1967 amendments provided the absolute exemption from withdrawals that Cities claim they bargained to retain in the 1980 MOU. Pet. 13-24. Both courts below, however, discounted the extrinsic evidence relating to the provision for withdrawals under the 1967 amendments. Pet. App. 13a, 23a, 24a.

Cities contend that the court of appeals improperly ignored what they characterize as admissions in the testimony of Mr. Hine, Mr. Magaw, and others. Pet. 11, 17, 18-19. Yet, the district court did not find that testimony worthy of mention in its Findings of Fact and Conclusions of Law. Pet. App. 22a-30a; cf. *id.* at 13a. It accordingly furnishes no basis for challenging

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CVP system as the result of the construction of the new power plants. See Act of Aug. 12, 1955, Pub. L. No. 84-386, § 4, 69 Stat. 720. A 1962 statute, which authorized construction of the New Melones project, provided a similar first preference for customers in Tuolumne and Calaveras Counties. See Act of Oct. 23, 1962, Pub. L. No. 87-874, § 201, 76 Stat. 1191-1192.

As the court of appeals observed, those provisions limit the amount of electrical power Western can sell. Pet. App. 10a. Moreover, those provisions were part of the public record at the time of the settlement and, therefore, provide a proper basis for resolving facial ambiguities in the MOU. With no showing of a contrary intent on the part of the Secretary, the provisions cited above clarify that the MOU provided for allocations to be subject to the two stated purposes having statutory bases. Additionally, because the Cities' theory ties together the fate of the three stated purposes, no justification remains to exclude the third (contractually based) purpose of preventing the CVP from exceeding its maximum peak load.

the standard of review employed by the court of appeals.

Cities ultimately focus on the text of the 1967 amendments—specifically on the words "curtailed" and "curtailment" in Article 7, which the Ninth Circuit read to provide for withdrawals for the three stated purposes. Pet. 18-24; see note 5, *supra*. Cities contend that the 1967 amendments contemplated "curtailment" in the sense of a temporary pro rata reduction associated with a shortage of supply, as opposed to "withdrawal" in the sense of a permanent reduction of the customer's CRD. See Pet. 18-19, 20-21.

It is not necessary to look beyond the 1967 amendments to see that "curtailed" does not have the constricted meaning Cities impute to it. Article 7(b) of the 1967 amendments refers to curtailment of CRD for the three stated purposes,[11] while the very next

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[11] Paragraph 7(b) of the 1967 amendments provides in relevant part:

> [Palo Alto's allotment shall be increased] until the total firm load of all preference customers reaches a simultaneous demand of 1,050 megawatts. In the event, however, that the power or energy available to serve the total firm load of all preference agencies contracting for power and energy is not sufficient, * * * if necessary said contract rate of delivery shall be curtailed so as not to exceed a prorata share of the total power and energy that is available. The total power and energy available to serve preference agency firm load shall be the power and energy generated at project generating plants that is not required for project operation or for sale either under Section 4 of the Act of August 12, 1955 (69 Stat. 719), or under [the first preference statutes].

paragraph, Article 7(c), promises the customer 90 days' advance notice of the "curtailment" of its CRD and permits the customer, in response, to terminate the contract. Pet. App. 46a-47a.[12]

Cities also disregard the significance of a different provision of the 1967 amendments—Paragraph K of the General Power Contract Provisions—that undermines their interpretation of "curtailment" in Article 7. See Pet. 21. Paragraph K deals with billing adjustments in the event of certain "curtailments to service"; it contains the proviso that "withdrawal of power and energy under the contract provisions shall not be deemed curtailments to service." Pet. App. 36a-37a. The "curtailments to service" in Paragraph K are temporary interruptions to electric service "because of conditions on the power system of the United States." *Id.* at 36a. Those curtailments are not the predicted curtailments of CRD for the three stated purposes in Article 7(b) and (c). The proviso at the end of Paragraph K that "withdrawal of power and energy under the contract provisions shall not be deemed

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Pet. App. 12a-13a, 46a-47a. The court of appeals found this language to constitute an unambiguous recital of the three stated purposes. *Id.* at 13a.

[12] Paragraph 7(c) of the 1967 amendments provides in relevant part:

> In the event the United States must curtail an agreed-upon contract rate of delivery, or the energy associated therewith, it shall give written notice to the Contractor ninety (90) days in advance of the effective date of such curtailment, and the Contractor may terminate this contract within thirty (30) days after receipt of such notice.

Pet. App. 47a.

curtailments to service" recognizes the provisions for withdrawals in the main body of the contract; otherwise, no distinction would have been needed for billing-adjustment purposes between unforeseen "curtailments to service" and anticipated permanent "withdrawal of power and energy under contract provisions." Pet. App. 36a, 37a.

3. Finally, Cities argue that Western's interpretation of "nonwithdrawable" would deprive Cities of their only benefit from the MOU. Pet. 27-30.[13] Both the district court and the court of appeals rejected that contention. See Pet. App. 14a. Cities now acknowledge that it was advantageous for them to be assigned a specific maximum allocation in the MOU. Pet. 28. They take issue, however, with the court of appeals' characterization of their pre-MOU situation (which the assigned allocations remedied) as a "race" among the Cities. Pet. 27 (citing Pet. App. 14a). They insist that "[t]he reference to a race is colorful, but there was no race prior to the MOU, wasteful or

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[13] The Ninth Circuit explained the improvement in Cities' post-MOU situation as follows:

> Foremost among the benefits received under the MOU is each City's ability to grow into its full allotment at its own pace, without the wasteful race to compete for load growth that characterized the previous arrangement. Findings at 15-16. Under *Andrus*, Western had complete discretion to sell all of its power to other preference customers, leaving [Cities] without any CVP power. The MOU spared the [Cities] this unfavorable outcome by granting rights to purchase guaranteed amounts of CVP power, subject only to the same withdrawals for the three stated purposes that characterized all of Western's typical pre-MOU sales contracts.

Pet. App. 14a.

otherwise, among Cities for load growth." Pet. 28. The term "race," however, was coined by Cities' only witness,[14] and the court of appeals' characterization of the advantages derived from the MOU conforms to that of the district court.

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[14] On direct examination, Cities' self-described "principle [*sic*] negotiator," 7/24/90 R.T. at 334, who was Palo Alto's Director of Utilities when the MOU was negotiated, explained that if one city were to attract a large industrial customer because of cheap federal hydroelectric rates, there would be little of the total CVP power left for the other cities. *Ibid.* He testified:

> We were all concerned that we were in a sort of a *race* to use up the available power—I don't want to say that anyone was trying to use power indiscriminately—basically it depended on which city grew faster.

7/24/90 R.T. at 333 (emphasis added). Cities now seek to minimize the MOU's benefit regardless of whether the term "nonwithdrawable" barred exemption from withdrawals for the three stated purposes. But Cities cannot disavow the testimony of their own negotiator.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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